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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 253

GRIFF WILLIAMS,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SEVENTH CIRCUIT AND BRIEF IN SUP-
PORT THEREOF.**

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**PETITION FOR WRIT OF CERTIORARI TO THE
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FOR THE SEVENTH CIRCUIT.**

Your petitioner, Griff Williams, respectfully prays that a writ of certiorari issue to review a decision in the United States Circuit Court of Appeals for the Seventh Circuit made on February 27, 1942, reversing a judgment in his favor for \$536.04 and interest, entered in the District Court of the United States for the Northern District of Illinois, Eastern Division, on May 2, 1941. The action in the District Court was a suit to recover the employer's portion of Social Security Taxes and interest paid by the petitioner (the taxpayer) for the calendar year 1938. Such taxes were imposed under Title VIII, Section 804 of the Social Security Act of 1935, as amended (42 U. S. C. A., Sec. 1004), upon the theory that petitioner was an employer of the other musicians composing an orchestra of which he was

a leader and in which he was the piano player. The findings of fact and conclusions of law made by the District Court are reported in 38 Fed. Supp. 536. The opinion of the Circuit Court of Appeals is not yet reported but is printed in the transcript of record, page 386.

Jurisdictional Statement.

The jurisdiction of this Court is based upon *Section 240 of Judicial Code, 26 Stat. 828; U. S. C. A. Title 28, Section 344*. Judgment was entered by the United States Circuit Court of Appeals for the Seventh Circuit on February 27, 1942. No petition for rehearing was filed and the time for filing of petition for rehearing expired on March 19, 1942. The jurisdiction of the District Court of the United States for the Northern District of Illinois, Eastern Division was based upon *Section 24, par. Fifth, Act of March 3, 1911 (36 Stat. 1092) 28 U. S. C. A. 41 (5); Sec. 24, par. Twentieth, Act of March 3, 1911 (36 Stat. 1093) as amended by Sec. 1310 (c), Act of November 23, 1921 (42 Stat. 311) re-enacted by Sec. 1025 (c), Act of June 2, 1924 (43 Stat. 348) and amended by the Act of February 24, 1925 (43 Stat. 972) 28 U. S. C. A. Sec. 41 (20)*.

Pursuant to petition and order of the court, the time for filing this writ was extended to July 25th.

Question Presented.

The sole question involved in this case is whether the taxpayer, the leader of and piano player in an orchestra, known as "Griff Williams and His Orchestra", was, during the year 1938, the employer of the other musicians comprising the orchestra within the meaning of Sections 804 and 811 of Title VI of the Social Security Act of 1935 as amended, or whether the hotel or other establishment employing the services of the orchestra with the ex-

pectation of realizing profit thereon was such employer, so as to render the hotel or establishment rather than the leader liable for Social Security taxes.

Summary and Short Statement of the Matters Involved.

The following facts all appear in the findings of fact made by the district judge and are set forth in pages 318-333 of the record.

Petitioner is and since 1930 has been a member of San Francisco Local No. 6 of the American Federation of Musicians, a labor union affiliated with the American Federation of Labor. After acting as a pianist from time to time under the leadership of others, petitioner assembled and played in an orchestra in San Francisco in 1934, which, with many changes in personnel (seven during the year 1938), has since 1935 and during the taxable year in question, viz: 1938, been known as "Griff Williams and His Orchestra." Petitioner is the leader of the orchestra and plays the piano therein. The members of the orchestra, including petitioner, were members of the union.

During the taxable year the orchestra performed at some twenty-two establishments, ranging from the West Coast of the United States to as far East as Chicago, Illinois. These performances consisted of playing popular dance music at both "steady engagements" (those for one week or longer) and "single engagements" (those for one night only) at hotels, restaurants, night clubs, ball rooms, amusement parks, clubs, colleges and civic organizations. The institution engaging the services of the orchestra is usually referred to as "the establishment" and the orchestra as "the attraction."

The members of the orchestra, known in the trade as "sidemen," were selected by petitioner with an oral understanding and agreement between them that each would receive compensation for his services, which in no event

was or could be less than the scale of wages fixed by the local union in whose jurisdiction the engagement was performed. Each sideman was a member of the American Federation of Musicians and his relationship with petitioner was defined and limited by the Constitution, By-Laws, Rules and Regulations of that organization.

In 1934 petitioner entered into an agreement with the Music Corporation of America, a booking agency, making that corporation his exclusive agent for the purpose of booking engagements for the orchestra, for which services the agent was paid a commission. All of the engagements during the year 1938 were booked by that corporation. Written contracts, typical examples of which were included in the findings of the District Court, were negotiated by the Music Corporation of America acting "only as agent" and were entered into with the management of the various establishments. The establishments were familiar with petitioner and the orchestra, its reputation and its special quality of music and they relied on petitioner to bring an organization composed of musicians selected and rehearsed by him and capable of performing its special quality of music. Petitioner exercised his skill as a musician to interpret the music in such manner as to produce certain musical effects and to do so made and caused others to make arrangements of regularly published stock compositions which were added to his own library of sheet music from which he customarily selected the compositions to be performed.

By the terms of the contract the establishment engaged the attraction known as "Griff Williams and His Orchestra" to perform at a certain time and place for an agreed price. The hours of performance and the number of musicians were usually stated in the contracts. Each contract incorporated by reference the laws, rules and regulations of the American Federation of Musicians. By such

laws, rules and regulations certain restrictions were placed with respect to prices for performances, the number and length of rehearsals and intermissions, cancellation of contracts and conduct of the leader and sidemen. The establishment engaging the services of the orchestra is referred to in the contracts as "the employer" and in the same manner in the By-Laws of the Federation.

The sidemen dressed alike and each owned both formal and informal dress and furnished their own instruments, other than the piano, which was furnished by the establishment. Petitioner and the sidemen combined together to produce the music desired by the establishment, the efforts of each dependent on the efforts of all, and each contributing according to the musical instrument at which each was particularly skilled. Petitioner owned music racks and a public address system for use where such equipment was not supplied by the establishment. The establishment invariably owned or controlled the premises on which the services were performed and designated the particular place on the premises where the orchestra was to rehearse and perform and where the members of the orchestra were to retire during intermissions. Usually, on steady engagements, and occasionally on single engagements, the orchestra was required to play special music for floor shows presented by the establishment. On such occasions the selections to be played and the manner of rendition were designated by the establishment or by the participants in the floor shows. This called for special rehearsals with the other talent at times and places fixed by the establishment within the limit of the Federation rules. The time of regular rehearsals was fixed by petitioner.

The establishments engaging the services of the orchestra during 1938 did so with the expectation of profit to such establishments. The prices charged for the musical entertainment afforded by the orchestra were fixed by the estab-

lishments, and neither the petitioner nor other members of the orchestra had any voice in the setting of such price. When a license was required in order that the orchestra could play copyrighted music, such license was procured by the establishment at its expense from the owner or controller of the copyright. The expense of advertising the orchestra was directed, controlled and borne by the establishment.

The above is a summary of certain facts as found by the District Court, which were not criticized by the respondent in the Circuit Court of Appeals.

The District Court also found that the petitioner himself, or by his representative, collected in a lump sum from the establishments the compensation of the orchestra to which they were entitled under the several contracts, and that upon receiving such compensation from the establishments the petitioner distributed and paid to the members of the orchestra the compensation due to them respectively. The Circuit Court of Appeals held that to the extent that the word "distributed" implied that the petitioner was acting as the agent of the establishment in making such distribution, this finding was not supported by substantial evidence.

The chief controversy, however, between petitioner and respondent relates to finding No. 19 of the District Court, consisting of 21 paragraphs, each purporting to show some element of control exercised by the establishments over petitioner and the other members of the orchestra. In its brief in the Circuit Court of Appeals, respondent made no attack upon sub-divisions (b), (c), (d), (f), (g), (i), (j) and (o) of finding No. 19 and thereby admitted that the establishments (b) owned or controlled the premises at which the services were performed and (c) furnished, at their own expense, implements for facilitating the perform-

ance of the orchestra, such as pianos, music racks, chairs, sound amplifiers, microphones and special lighting facilities; (d) designated, and at times, changed the room and the specific place in the room within the premises of the establishment, or elsewhere, where the orchestra performed; (f) prescribed the route and manner whereby the members of the orchestra reached and left the orchestra stand; (g) prescribed the rooms or parts of the establishment to which the musicians were to repair and confine themselves during intermissions and rest periods or while not performing; (i) regulated the deportment and personal conduct and dress of the leader and the other members of the orchestra while on the premises of the establishment, whether or not during the hours of performance, and especially matters relating to visiting at tables occupied by guests or other contacts with guests or other persons working in the establishment; (j) procured the required licenses for the performance of copyright music and required the orchestra to conform to any pertinent restrictions in connection therewith; and (o) gave constant attention to see that their own ideas of first-class showmanship were carried out.

The elements of control found by the District Court to have been exercised by the establishment and which are controverted by the Government are that during the year 1938 the establishments at times did the following things: (a) determined the number of musicians to be employed and the instrumentation; (e) gave the orchestra leader directions covering what the establishment required or expected of the leader and the orchestra; (h) required (1) uniformity in dress, (2) which uniformity varied from occasion to occasion, (3) prescribed unusual dress or attire which was furnished by the establishments, to be worn by the members of the orchestra when so directed; (k) required the orchestra to broadcast at specific times and places under contractual

arrangements made between the establishment and the broadcasting facility and required the program to be broadcast to be submitted in advance and subject to censor or change; (l) required the musicians to coordinate and conform to the convenience of the establishment in the service of food and beverages and to the schedule of floor shows separately employed by the establishment; (m) required the orchestra leader to act as Master of Ceremonies in connection with talent separately employed and make such announcements as they designated; (n) required the performance of special features by members of the orchestra as vocalists, glee clubs, soloists, etc., and directed the staging of performances in accordance with the establishment's ideas of showmanship; (p) required the leader or other members of the orchestra to audition other talent and to perform in connection with other groups, either on or away from the premises of the establishment; (q) directed certain members of the orchestra not to perform at specified times and on certain occasions; (r) required the orchestra (1) to rehearse at such time and place as it designated with other talent separately provided by the establishment and (2) to play any music specially required by such other talent in the tempo, style and manner which was designated either by the establishments or the talent, as the case might be; (s) dictated (1) the style of music, (2) its length and tempo, (3) its volume, and (4) designated selections and (5) order and type of selections or numbers to be played; (t) determined (1) the time the musicians were to appear before the performance was scheduled to begin, (2) the time when the performances were to begin and end, (3) the hours of work, (4) the time when intermissions and rest periods were to be taken (subject to the regulations of the Federation) and their length; (u) furnished verbal, typewritten or printed instructions to the orchestra cover-

ing matters of punctuality, dress, deportment and other details of the performances, including prohibitions against the use of certain selections and the requirement that certain specified selections be rendered.

Reasons Relied Upon for the Allowance of the Writ of Certiorari.

(1) This case was filed as a test case, has been recognized by the Government as such, and should receive the consideration of this Court.

(2) This case affects matters of vital consequence to the 140,000 members of the American Federation of Musicians, involving liabilities running into millions of dollars and possible disruption of long established practices and relationships.

(3) The Circuit Court of Appeals for the Seventh Circuit has decided an important question of Federal law which has not been, but should be, settled by this Court. That question is, whether the leader of an orchestra or the hotel or establishment employing such orchestra is the employer of the other members of the orchestra. The Circuit Court of Appeals, in determining the question against the leader, has adopted a narrow, common law tort liability approach to the interpretation of the terms "employer" and "employee" as used in the Act, without regard to the broad social purposes of the legislation. Unless the decision of the court below is modified by this Court, a precedent will have been established whereby strict concepts of tort liability will be made applicable to the interpretation of the Act in all cases, without regard to the nature of the employment involved.

(4) In all events, common law concepts were erroneously applied by the court below in concluding that the leader was the employer and the hotel not, which error can be remedied only by this Court.

(5) Great confusion and conflict of opinion exists between interpretation of employment status of orchestra members by and between administrators of the Social Security Act and the Internal Revenue Department, between the decisions of lower Federal courts, and between the decisions of state Supreme Courts defining the terms in unemployment compensation questions arising under the Social Security Act.

WHEREFORE, it is respectfully submitted that this Petition for Certiorari to review the decision of the United States Circuit Court of Appeals for the Seventh Circuit should be granted.

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